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# State v. Fleming Respondent's Brief Dckt. 37082

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 37082
	)	
v.	)	
	)	
JAMES J. FLEMING,	)	RESPONDENT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

Issue

Has Fleming failed to establish that the district court abused its discretion, either by imposing concurrent unified sentences of 40 years, with 15 years fixed, for lewd conduct with a minor under 16, and 25 years, with 15 years fixed, for sexual abuse of a child under the age of 16, or by denying his Rule 35 motion for a reduction of sentence?

Fleming Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Forty-six-year-old Fleming sexually abused 14-year-old K.B. and 14-year-old K.F. (PSI, p.2.) Fleming took K.F. “into the mountains” and “asked her to remove her clothes so he could take pictures of her.” (PSI, p.2.) When K.F. refused, Fleming “came up

behind her and touched her breast by placing his hands underneath her shirt and bra, touching her skin to skin.” (PSI, p.2.) K.F. reported that “after repeatedly telling [Fleming] ‘No,’ he eventually took her home.” (PSI, p.2.)

Fleming sexually abused K.B. “one or two times a week” over a period of approximately seven months. (PSI, p.2; PSI attachments, pp.31-32<sup>1</sup>.) Fleming touched K.B.’s breasts, “grabbed her butt,” and rubbed her bare vaginal area. (PSI attachments, p.32.) He took numerous photographs of K.B., ranging from “fully clothed to [K.B.] being completely naked with her legs spread.” (PSI, p.2.) Fleming bribed K.B. by paying her “between \$30 and \$40 between one or two times a week” to pose for the photographs. (PSI, p.2.) K.B. stated that she did not disclose the abuse because “she was afraid of [Fleming] due to his threats.” (PSI, p.2.)

The state charged Fleming with lewd conduct with a minor under 16 and two counts of sexual abuse of a child under 16 years of age. (R., pp.67-68.) Pursuant to a plea agreement, the state dismissed two felony charges, filed an amended information<sup>2</sup> charging Fleming with lewd conduct with a minor under 16 and one count of sexual abuse of a child under 16 years of age, and agreed not to object to Fleming’s sentences “being served concurrent with any federal sentence.” (Tr., p.5, L.15 – p.7, L.1y; R., pp.81-84, 118.) Fleming pled guilty to lewd conduct with a minor under 16 and entered

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<sup>1</sup> Pages attached to the PSI are hand-numbered on the lower right corner.

<sup>2</sup> The amended information consolidated one count of sexual abuse of a child under 16 against K.F. in district court case number CRF-2009-113 with the lewd conduct charge against K.B. in district court case number CRF-2009-114, resulting in case number CRF-2009-113 being dismissed. (Tr., p.5, L.15 – p.6, L.15.) The remaining two charges of sexual abuse of a child under 16 in case number CRF-2009-114 were dismissed pursuant to the plea agreement. (R., pp.113, 118.)

an Alford<sup>3</sup> plea to sexual abuse of a child under 16 years of age. (R., pp.78-80.) The district court imposed concurrent unified sentences of 40 years, with 15 years fixed, for lewd conduct with a minor under 16, and 25 years, with 15 years fixed, for sexual abuse of a child under the age of 16. (R., pp.122-25.) Fleming filed a notice of appeal timely from the judgment of conviction. (R., pp.142-44.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.151-53; Order Denying I.C.R. 35 Motion (Augmentation).)

Fleming asserts his sentences are excessive in light of his risk to reoffend, mental health issues, medical conditions, status as a first-time offender, past military service, friend and family support, and purported remorse. (Appellant's brief, pp.8-9.) The record supports the sentences imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it

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<sup>3</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

In fashioning appropriate sentences, the district court considered the egregiousness of the offenses, the danger Fleming presents to the community, and Fleming's failure to accept full responsibility for his criminal conduct. Fleming sexually molested two girls who were over 30 years his junior. (PSI, pp.1-2.) He took exploitative photographs and sexually abused K.B. several times a week over a prolonged period of time. (PSI, p.2.) The district court noted, "The conduct was perverse; it was disgusting" (Tr., p.87, Ls.13-14), and, "It appears to me that, based on the conduct, the length of time this occurred, that the defendant was grooming these victims" (Tr., p.86, L.25 – p. 87, L.2). The presentence investigator characterized Fleming as a "predator by design" (PSI, p.11), and stated:

Given the sheer age difference from the victim(s) age(s) of fourteen (14), and that of the defendant of forty-five (45) it goes without saying that he violated the trust and boundaries of his age responsibilities. The instant offense was for the purpose of sexual gratification, and exploitation for the defendant with no apparent regard for the minor victim(s) ages who were not of consent age. In addition, and compounding the instant offense, the defendant repeatedly engaged in this activity and employed fear, and/or threats toward the minor victim(s).

(PSI, p.10). In her comments to the court, K.B.'s mother stated that Fleming "showed [K.B.] guns and threatened my daughter with killing me and our animals if she did not continue to be compliant." (Tr., p.30, L.24 – p.31, L.1.) The sentences imposed are reasonable in light of the egregiousness of the offenses.

Fleming refused to accept full responsibility for his sexual misconduct, claiming that his actions were limited to taking "the initial picture" of K.B. (PSI, p.11.) He later told the psychosexual evaluator that "there was only one incident wherein there was

actual physical or sexual contact with [K.B.] ... he touched her vaginal area with one hand. He used this hand to spread her vagina open, while shooting a photograph with his other hand.” (Psychosexual Evaluation, p.5.) The presentence investigator reported that Fleming “appears to be playing games with the acceptance of responsibility to the fullest” (PSI, p.10) and that he “places any wrong doing upon the fourteen year old victim [K.B.], and her mother” (PSI, p.11).

The district court also noted that Fleming “has presented himself as a victim” (Tr., p.86, Ls.18-19), a finding that is supported by Fleming’s statement: “First let me start off with deep regret and sorrow to both of the two victumes [sic] K.B. and myself” (PSI attachments, p.1). Fleming insisted that he “never did anything improper with K.F. at any time” (PSI attachments, p.5), and stated, “No additional crimes have happened. I believe in peoples [sic] honest [sic] and I get played because of it” (PSI, p.4). Fleming also denied the separate report of his adult stepdaughter, Tiffany, that Fleming sexually abused her when she was between the ages of 10 and 13 years old. (Letter from Tiffany Morones, p.1; Psychosexual Evaluation, p.5.) The district court concluded, “The defendant is not, in any sense of the word, a victim here today” (Tr., p.86, Ls.23-25), and, “[I]t’s quite obvious that your conduct, Mr. Fleming, in committing the crimes for which you’re being sentenced has and continues to have and will have an effect on the victims and the victims’ families” (Tr., p.85, Ls.7-12). The state advised, “We know what the effect has been on both of these girls. It’s been substantial. Depression, suicidal ideation, cutting, nightmares, esteem issues, and other ramifications.” (Tr., p.73, L.23 – p.74, L.1.) The sentences imposed are appropriate in light of Fleming’s

failure to accept full responsibility for his ongoing sexual misconduct and the great harm done to the victims.

The district court considered all of the relevant information and imposed reasonable sentences, stating, “The defendant is a risk” (Tr., p.87, L.18), and, “Protection of society in any case is the primary consideration, and in a case like this, protection of society is first and foremost a consideration I will use” (Tr., p.88, Ls.12-15). The sentences imposed are appropriate in light of the nature of the offenses, the harm done to the victims, Fleming’s failure to accept full responsibility for his atrocious behavior, and the risk he presents to the community. Given any reasonable view of the facts, Fleming has failed to establish an abuse of sentencing discretion.

Fleming next asserts the district court abused its discretion by denying his Rule 35 motion. If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Fleming must “show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” Id. Fleming has failed to satisfy his burden.

Fleming provided no “new” information in support of his Rule 35 motion. In its order denying Fleming’s Rule 35 motion, the district court noted that Fleming merely discussed “the facts and circumstances of his case that were before the court at the time of sentencing.” (Order Denying I.C.R. 35 Motion, p.3 (Augmentation).) The state submits that by failing to establish his sentence was excessive as imposed, Fleming has

also failed to establish the district court abused its discretion by denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm Fleming's convictions and sentences and the district court's order denying Fleming's Rule 35 motion for a reduction of sentence.

DATED this 7<sup>th</sup> day of July, 2010.

/s/ \_\_\_\_\_  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7<sup>th</sup> day of July, 2010, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ELIZABETH ANN ALLRED  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ \_\_\_\_\_  
LORI A. FLEMING  
Deputy Attorney General